



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2011

Mr. Vince Ryan
County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2011-06972

Dear Mr. Ryan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 418442.

The Harris County Sheriff's Office (the "sheriff") received a request for: (1) information pertaining to medical services provided to Harris County (the "county") inmates from 2007 to 2010, including any related agreements and (2) expenses incurred by the county for the safekeeping of prisoners from other counties from 2005 to 2010.¹ You state you do not have information responsive to the second category of the request.² You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.³ We have considered the exception you claim and reviewed the submitted representative sample of information.⁴

¹We note the sheriff sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify request).

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

³Although you also raise section 552.107 of the Government Code, you provide no arguments explaining how this exception is applicable to the submitted information. Thus, we presume you have withdrawn your claim under this exception. *See* Gov't Code §§ 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested), .302

⁴We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We note a portion of the submitted information falls within the scope of section 552.022(a)(3) of the Government Code, which provides that information in an account, voucher, or contract relating to receipt or expenditure of public or other funds by a governmental body is subject to required public disclosure unless it is made expressly confidential under "other law." Gov't Code § 552.022(a)(3). You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. However, this is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, you may not withhold the information at issue, which we have marked, under section 552.103 of the Government Code.

You claim the remaining information is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You argue the sheriff anticipates litigation pertaining to outstanding debts incurred by the sheriff. You state the remaining information relates to the subject matter of the anticipated litigation. You inform us the requestor has stated he "may pursue all available remedies, including legal remedies" to determine if the debts can be offset. However, we find you have failed to adequately demonstrate the requestor had taken any concrete steps towards litigation on the date the request was received. *See* ORD 331. Thus, we find you have failed to demonstrate the sheriff reasonably anticipated litigation when the request for information was received. *See* Gov't Code § 552.103(c) (governmental body must demonstrate that litigation was pending or reasonably anticipated on or before the date it received request for information). Accordingly, the sheriff may not withhold any of the information at issue under section 552.103.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information other statutes make confidential, such as the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open

Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find a portion of the remaining information constitutes confidential medical records. Thus, the information we have marked may only be released in accordance with the MPA. ORD 598.

In summary, the sheriff must release the information we have marked under section 552.022(a)(3) of the Government Code. The information we have marked may only be release in accordance with the MPA. The remaining information must be released.⁵

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/eb

Ref: ID# 418442

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

⁵We note the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).